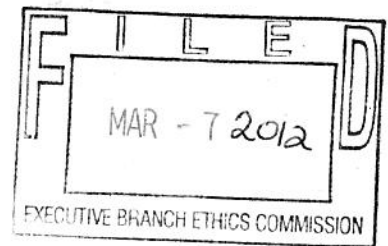


**COMMONWEALTH OF KENTUCKY
EXECUTIVE BRANCH ETHICS COMMISSION
AGENCY NO. 08-019
ADMINISTRATIVE ACTION NO. 08-EBEC-0340**



EXECUTIVE BRANCH ETHICS COMMISSION

COMPLAINANT

vs.

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
RECOMMENDED ORDER AND NOTICE OF APPEAL RIGHTS**

JOYCE PARKER

RESPONDENT

* * * * *

An Administrative Hearing was held in this matter on December 8, 2011. The Complainant, Kentucky Executive Branch Ethics Commission, was represented by Kathryn H. Gabhart, General Counsel, with John Steffen, Executive Director, as Co-Counsel. The Respondent, Joyce Parker, was represented by Luke Morgan, McBrayer McGinnis Leslie & Kirkland, and Bobby H. Richardson, Richardson Gardner Barrickman & Alexander. The Hearing was presided over by Susan S. Durant, Hearing Officer, Administrative Hearings, Office of the Attorney General. The following witnesses testified: JoJuana Leavell-Greene, Human Resources Branch Manager for PVA Administrative Support, Department of Revenue; Christis Garland, former employee of the Laurel County PVA Office; Jill LeMaster, currently an employee of the Kentucky Auditor of Public Accounts, formerly the Executive Director of the Kentucky Executive Branch Ethics Commission; Bill Alward, Muhlenberg Property Valuation Administrator, and formerly President of the PVA Association, and Joyce Parker, Property Valuation Administrator of Laurel County. LeMaster and Alward testified telephonically by agreement.

The issue in this matter is whether Joyce Parker as PVA of Laurel County violated KRS 11A.020(1)(c) by using her official position or office to obtain financial gain for her daughter, Christis Garland, when she hired her as a full-time seasonal employee for three months in 2006

and then subsequently in 2007 as a full-time Secretary in the Laurel County PVA Office. It is concluded that Joyce Parker did violate the cited statute.

BRIEF PROCEDURAL BACKGROUND

1. The procedural background for Administrative Actions 08-EBEC-0334 through 08-EBEC-0344 are all the same. The Findings of Fact, Conclusions of Law, and Recommended Order vary according to the evidence presented at the Hearing in each case and the legal arguments made in each case.

2. On October 7, 2008, an Initiating Order was filed in this matter by the Executive Branch Ethics Commission. The Initiating Order in regard to Joyce Parker was one of eleven initiating orders charging various Property Valuation Administrators (PVAs) throughout the Commonwealth with violating KRS 11A.020(1)(c). The charged statute states:

(1) No public servant, by himself or through others, shall knowingly:

....

(c) Use his official position or office to obtain financial gain for himself or any member of the public servant's family.. . .

All of the PVAs were charged with violating the Executive Branch Code of Ethics because they employed and/or promoted members of their families.

3. On October 30, 2008, Parker, along with the other PVAs, filed an Answer to the Initiating Order. On December 2, 2008, the PVAs, who were all represented by the same two attorneys, filed an Agreed Order Holding Administrative Actions in Abeyance.

4. The administrative actions were stayed while the PVAs prosecuted a declaratory judgment action in Franklin Circuit Court. In that action the PVAs asserted that they were not "public servants" or "officers" as defined in KRS 11A and thus were not subject to the jurisdiction of the Executive Branch Ethics Commission. The Franklin Circuit Court judge agreed that the Executive Branch Code of Ethics did not apply to PVAs. The Executive Branch

Ethics Commission appealed the Franklin Circuit Court judgment to the Kentucky Court of Appeals. On June 18, 2010, the Court of Appeals in an unanimous decision reversed the Franklin Circuit Court judgment. *See, Kentucky Executive Branch Ethics Commission v. Atkinson*, 339 S.W.3d 472 (Ky. App. 2011). On June 9, 2011, the Kentucky Supreme Court denied discretionary review.

5. On June 13, 2011, Franklin Circuit Court issued an Order of Dismissal that lifted the abeyance of this administrative action. On July 26, 2011, the parties agreed to hearing dates for the first five PVAs' actions to be heard.

FINDINGS OF FACT

6. Joyce Parker initially became Laurel County PVA on September 20, 2004, as the result of a gubernatorial appointment. Exhibit 8 to the Hearing. (Hereinafter cited as Ex. __.) She had previously been a math teacher and bookkeeper.

7. On June 13, 2006, Parker wrote Marsha McQueary in the Department of Revenue, Office of Property Valuation, in Frankfort, asking permission to hire Christis Garland as a Seasonal Full-time employee to do data entry. Parker explained that the office was short-handed and the job candidate had previous experience with computer data entry. Because deputies in the PVA office must be at least 21, Parker assured McQueary that Garland would not be doing any assessing because she was only 20 years old. The position would be paid through OX funds which are locally generated. Ex. 5.

8. On June 16, 2006, Joyce Parker, as the PVA, recommended that Christis H. Garland be appointed as a seasonal full-time employee. The Request for Personnel Action (RPA) indicated that Garland was a high school graduate with one year of college credit and four months of work experience. Her pay grade was 6 and her monthly salary was \$1293.18.

Garland's position title was Data Entry Operator Trainee. The position was to last from June 26, 2006, until September 30, 2006. Ex. 1. Garland is Parker's daughter and was living with her at the time. Before Garland began work, Parker took her daughter to Frankfort so that she could be trained for the PVA position.

9. As Christis testified, she worked in the Laurel County PVA Office during the summer of 2006. *See* Ex. 2. She then stopped working and had a baby.

10. On December 1, 2006, Parker wrote the Executive Director of the Office of Property Valuation, Department of Revenue, Frankfort, and again requested permission to hire Garland. This time the request was for full-time permanent employment as a Secretary. Neither the June, 2006, request nor the December, 2006, request stated that Christis Garland was her daughter. Neither time did Parker interview any other candidates for the position. Tr. at 245. The December request pointed out that Garland would be 21 on December 25, 2006, and thus the requested employment date should be January 1, 2007. Ex. 6. The RPA stated that Garland's rank was a 6 and her pay was \$1326.50 per month. Ex. 3. On July 1, 2007, at the request of Parker, Garland received a 6 month 5% pay increase. Her rank remained a 6 but her salary was now \$1439.24 per month. Ex. 4. The pay increase was at the discretion of PVA Parker.

11. On August 8, 2008, Garland ceased working for her mother. The stated reason was "dismissal due to lack of funds." Ex. 10. Garland testified that she went back to school.

12. Parker testified that she did not know that it was unethical to hire a family member. Her immediate predecessor as PVA had hired a long-time boyfriend and a daughter. That person then became director of the PVAs in the Commonwealth. JoJuana Leavell-Greene, who is the Branch Manager for the PVA Administrative Support Branch in the Department of Revenue, came to Laurel County when Parker became PVA in 2004 in order to train her on the

personnel and administrative tasks required by the state. Leavell-Greene testified that she typically provided a copy of the Executive Branch Ethics handbook during a local orientation. Tr. at 98-99. Leavell-Greene also testified that if Parker had asked her in 2004 about hiring a family member she would have told her to contact her local county attorney for guidance. Tr. at 71, 85. Leavell-Greene stated that she herself did not know that PVAs should not hire family members until she heard Jill LeMaster talk about Executive Branch Ethics Opinion 04-34 in November, 2006. Tr. at 68. However, since at least 1999 the Department of Revenue has provided the Executive Branch Ethics Commission with a list of all PVAs so that the Commission could send each PVA a Statement of Financial Disclosure form to be filled out and returned to the Commission. Thus, Revenue and the PVAs should have known from the request for Financial Disclosure that Executive Ethics considered the PVAs under its domain.

CONCLUSIONS OF LAW

13. KRS 11A.020 provides:

(1) No public servant, by himself or through others, shall knowingly:

....

(c) Use his official position or office to obtain financial gain for himself or any member of the public servant's family.. . .

The provision, as part of the Executive Branch Code of Ethics, became effective on July 14, 1992, and has not been amended subsequently.

14. In her closing argument, Parker argued initially that she did not violate the statute because she did not "use her official position or office" for the benefit of Christis Garland. Parker placed the blame for Garland's appointment squarely on the Department of Revenue referring to "Revenue's obligation to be the gate-keeper of PVAs personnel decisions," "the Respondent did not hire Garland, Revenue did," and "Revenue is the sole arbiter of this hiring decision." Respondent's Proposed Recommendations of Law at 4. (Hereinafter cited as Resp. at __.)

15. KRS 132.590(8), which is cited by the Respondent, indicates that the PVA “appoints” employees, who “may be removed at the pleasure of the property valuation administrator.” The Fiscal and Personnel Administration Office of Property Valuation Administrator handbook which originated through a conference of PVAs, states: “**All employees serve at the pleasure of their respective PVA, and are at will, unclassified, non-merit, non-P1 state employees.**” Ex. 7 p.6 [Emphasis in original.]

16. As Leavell-Greene explained, Revenue’s role in regard to PVA employees is limited to “payroll, personnel, budget, training.” Tr. at 38. Her Branch ensures that the office structure supports the grade requested by the PVA. Tr. at 44. Revenue does not review family relationships in regard to Requests for Personnel Action. Tr. at 72. Revenue is not the enforcer of the Executive Branch Code of Ethics. It is the Executive Branch Ethics Commission who enforces the Code. KRS 11A.080; KRS 11A.100.

17. The second flaw in the statutory charge according to Parker is that “financial gain” must be “unwarranted or in conflict with the interests of the public at large.” Resp. at 6. Initially, it must be observed that the policy behind the Code of Ethics begins:

It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:

(a) A public servant be independent and impartial;

....

(c) A public servant not use public office to obtain private benefits; and

(d) The public has confidence in the integrity of its government and public servants.

KRS 11A.005(1). Justice Stephens’ concurrence in *Caudill v. Judicial Ethics Committee*, 986 S.W. 2d 435 (Ky. 1999), which is favorably referenced by Parker, appears to be especially useful in the context of this matter. The problem with financial gain connected with nepotism, which is

a particular form of favoritism, is that as the Justice Stephens concluded:

The evil that I believe anti-nepotism provisions are designed to combat is the appearance of impropriety which has the inevitable effect of undermining the public's trust in a given institution.

Id., at 439. As the Complainant Commission has emphasized, what is at issue is not Christis Garland's qualifications or her compensation, it is the favoritism in which an employee was hired because of a family relationship. As Parker's testimony indicated, PVA offices can become hereditary fiefdoms. The first Tax Commissioner in Laurel County (later PVA) hired his daughter who became the PVA who then hired her daughter who then became the PVA for 36 years and she hired her step-daughter who was a PVA employee for 32 years. Tr. at 229. Christis Garland's appointment was completely under the control of Parker, who hired her and then took her to Frankfort so she could be trained for the job.

18. Parker also raises as an affirmative defense "Violation of the doctrine of *stare decisis*." According to *Black's Law Dictionary*, Seventh Edition, *stare decisis* is: "The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." Parker argues that the Ethics Commission violated *stare decisis* because Advisory Opinion 93-94 stated that KRS 11A.020 (1)(c) contained no prohibition to the employment of family members and Advisory Opinion 04-34 stated that KRS 11A.020 (1)(c) prohibited such employment.

19. In the first year of its existence, the Executive Branch Ethics Commission, under the authority of KRS 11A.110(1) issued Advisory Opinion 92-10 which concluded that PVAs were covered by the Executive Branch Code of Ethics. Advisory Opinion 93-24 then followed in response to a query as to whether the Executive Branch Code of Ethics "disallowed" PVAs' employing relatives. Advisory Opinion 93-24 stated "the Executive Branch Code of Ethics does

not specifically prohibit the employment of relatives in PVA offices. However. . .” [Emphasis added.] The Commission then cited KRS 11A.020(1)(a) and (c) and concluded: “The Commission envisions certain circumstances where conflicts of interest could arise under such employment. The Commission encourages your agency to follow policies to avoid any real or perceived conflict of interest in this area.” Ex. 7. In short, the Commission did not state that the Code prohibited nepotism, but it did warn that employing family members could create conflicts of interest. Advisory Opinion 93-24 seemed to issue a “word to the wise,” the Commission knowing, as did Parker and Leavell-Greene, that many PVAs traditionally had family members in their offices.

20. In its post-hearing closing the Ethics Commission agreed that 93-24 did state that family members could work in the same office—but family favoritism would not be permitted. A PVA could create a conflict of interest by hiring members of his own family. The Opinion indicated that family members already employed in an office could remain.

21. On September 30, 2004, the Commission on its own motion again took up the issue of family members being employed in the same state agency as a public servant. The occasion was recent investigations within the Department of Parks which revealed that Parks and other state agencies needed further guidance. Advisory Opinion 04-34 again recited KRS 11A.020(1) and then proceeded to more explicitly set out problem areas:

[T]he Commission believes that KRS 11A.020(1)(a), (c) and (d) serve to prohibit a public servant from advocating or influencing in any way the employment, appointment, promotion, transfer, advancement of a member of the public servant’s family to an executive branch position of employment that the public servant directly supervises or manages.

Specifically, employees should not be involved in interviewing, recommending, or approving family members for positions within their employing agencies

22. Jill LeMaster, who was the Executive Director of the Executive Branch Ethics

Commission from 1993 until May 31, 2008, testified in response to a question about the difference between Advisory Opinion 93-24 and Advisory Opinion 04-34: "I don't believe it's a change. I believe the original opinion just said that the statute doesn't specifically spell out the prohibition." Tr. at 144 . LeMaster stated that the Commission always thought that public servants should not give an advantage to family members.

23. On July 29, 2007, the Ethics Commission issued Advisory Opinion 07-19 which reviewed nepotism under the Code of Ethics and amended Advisory Opinion 04-34. The Opinion stated that Advisory Opinion 04-34 pointed out that KRS 11A.020(1)(a), (c), and (d) prohibited advocating or influencing employment actions in regard to family members. The Opinion then took up the persistent problem of how to deal fairly with family members who were already under the supervision of a family member and had been for many years. The Opinion reiterated that since Advisory Opinion 04-34, public servants should not have been involved in the employment, supervision, or promotion of family members.

24. Advisory Opinion 07-19 urged a layer of supervision between a family member and a public servant to remove as much potential for conflict as possible. Parker pointed out that Garland had a layer of supervision between herself and her mother as the PVA. The Hearing Officer finds, however, that because the PVA wields all of the authority in regard to personnel decisions and because the Office in Laurel County had only nine employees, there was no effective barrier to a conflict of interest.

25. Thus, the advisory opinions have not been uniformly hard-nosed about conflicts of interest in the form of nepotism in regard to public servants but they have consistently said that public servants' employing, promoting, and supervising their family members created conflicts of interest. The Advisory Opinions started out gently in their warnings in 93-24; became

quite firm in 04-34; and then relented a bit in 07-19 in regard to previously employed family members. LeMaster stated that the Commission's Opinions and enforcement were always reactive rather than proactive, because the Commission only had 5-6 employees.

26. Although it is useful to point out that the advisory opinions wavered a bit in the firmness with which they dealt with family members in the same office with a public servant, *stare decisis* is not relevant to this matter. Advisory opinions are just "opinions." They offer guidance; they are not judicial precedents established through litigation. And, since Parker was apparently unaware of any advisory opinions before she hired Christis, it cannot be said that she relied upon Advisory Opinion 93-24 or any other opinion. Tr. at 250-251.

27. Parker also offered as an affirmative defense "Violation of the Doctrine of Contemporaneous Construction." This doctrine used in this context is quite similar to *stare decisis*. The doctrine as defined in *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky., 1991) means that "In most cases, an agency's interpretation of its own regulations is entitled to substantial deference. ... A construction of a law or regulation by officers of an agency continued without interruption for a long period of time is entitled to controlling weight." In this instance, advisory opinions are used as interpretations or regulations according to Parker. Therefore, because of contemporaneous construction, as stated in *In re Hughes & Coleman*, 60 S.W.3d 540, 543 (Ky., 2001): "An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . ."

28. The Hearing Officer, as previously stated, concludes that the focus of the nepotism opinions shifted slightly but there was no significant contradiction. Advisory Opinions 93-24, 04-34, and 07-19 were rational elaborations that provided a chain of coherent advice.

29. Because Parker was apparently unaware that the Executive Branch Code of Ethics

concerned her as a PVA, she cannot effectively argue that the Code was ineffective in guiding her conduct. As Parker testified, she did not think she was a Public Servant; she thought she was an elected official. Tr. at 252.

30. The final legal argument made by Parker seemed to be that the Commission had violated KRS 13A.120 by issuing unauthorized guidance concerning conflicts of interest and nepotism in the advisory opinions and by not promulgating specific anti-nepotism regulations. KRS 11A.110 (1) clearly gives the Commission the authority to “issue and publish advisory opinions on the requirements of this chapter for those who wish to use the opinions to guide their own conduct.” Parker also suggested that OAG Opinion 88-15 which found “no specific authorizing regulation for the Personnel Commissioner and the Personnel Board to promulgate regulations concerning nepotism,” somehow prohibited the Executive Branch Ethics Commission from concerning itself with nepotism. The Hearing Officer does not find it persuasive to argue that because the Personnel Board or the Personnel Commission cannot promulgate regulations against nepotism, the Legislature could not give the statutory authority to deter conflicts of interest or favoritism in the form of nepotism in the executive branch of the state government to another administrative body.

31. The statutes that are cited by Parker as being permissible anti-nepotism statutes are concerned with members of electric and water plants of third-class municipalities (KRS 96.172), members of boards of trustees of state universities (KRS 164. 225), local school boards (KRS 160.180), school councils for school-based decision making (KRS 164.345), and school superintendents and principals (KRS 160.380). These statutes support the view that the Commonwealth has wide reaching concerns about the nefarious impact of nepotism on the local as well as the state level.

32. Further, the above-cited statutes indicate that nepotism can be dealt with through statutes and does not require regulations. *Hagan v. Farris*, 807 S.W.2d 488 (Ky., 1991), and *Department of Education v. Gobert*, 979 S.W. 2d 922, 926 (Ky., 1998), are relied upon by Parker for the proposition that regulations are essential to interpret KRS 11A.020 (1)(c). However, those cases most firmly stand for the proposition that regulations cannot contradict statutes. Regulations may be used to “flesh out” statutes but KRS 11A.020(1)(c) does not suffer from any vagueness problems.

33. Finally, Parker offered Governor Steven Beshear’s Executive Order of June 2, 2008, as a standard against which to judge the arbitrariness of the Commission’s actions in charging Parker with violating KRS 11A.020(1)(c). That Executive Order stated that it is the Commonwealth’s policy to provide equal employment opportunity to all people without discrimination because of race, color...ancestry....” The Hearing Officer concludes that this broad affirmative policy set out in an Executive Order opens the doors of opportunity to all within the state. The practice of nepotism means that the door keeper only lets those related by birth or marriage enter the door of opportunity. The Commission’s view of KRS 11A.020(1)(c) supports public trust, impartiality, and the integrity of public servants. It compliments the Executive Order of June 2, 2008.

34. Parker’s contrast of KRS 11A (1)(c)’s ethical injunction against a public servant using his office to obtain financial gain for himself or any members of his family with KRS 132.590 (8) concerning the personnel classification system for PVA deputies and KRS 18A.110(5) concerning the Personnel Secretary’s authority to promulgate regulations is not convincing as a constitutional argument. Nor is Advisory Opinion 07-19 an *ex post facto* law.

35. It is to be stressed that this case was brought under KRS 11A.020 (1)(c)—no

Advisory Opinion was cited in the Initiating Order. The Advisory Opinions are useful in providing guidance, but the foundation of the complaint against Parker is the statute. The evidence presented at the Hearing is that Parker hired her daughter twice for the Laurel PVA Office and gave her a discretionary raise. Parker, like all citizens, is presumed to be familiar with the law of the state:

It is well established that all persons are charged with knowledge of the laws pertaining to their conduct. *Flint v. Executive Branch Ethics Commission*, 981 S.W.2d 132, 134 (Ky. App., 1998).

36. In mitigation of the penalty against Parker it must be said that unfortunately Parker received no effective Executive Ethics training. The evidence was that Parker first learned about Advisory Opinion 04-34 in April, 2007. Tr. at 233-234. There was no evidence as to what attempts were made to routinely and effectively disseminate the advisory opinions that impacted on the hiring practices of PVAs. Parker's initial contact with the Ethics Code was through Leavell-Greene and Leavell-Greene did not know that PVAs should not hire family members until November, 2006. Looking at the composition of the Laurel County PVA Office from 1992 when KRS 11A.020 was enacted until 2004 when she became PVA, Parker would have seen no challenge to PVAs' supervising family members. Nor, according to the testimony and evidence presented at the Hearing, did Parker receive any enlightenment on the subject until 2007.

37. In counter-mitigation it must pointed out that Christis remained an employee of the Laurel County PVA Office for over a year after Parker was informed that the Ethics Commission considered the employing of family members to be unethical. Garland's departure from the office was for economic reasons, not ethical concerns.

38. The statute states: " No public servant, by himself or through others, shall knowingly . . . use his official position or office to obtain financial gain for himself or any

member of the public servant's family. . . ." The evidence presented at the Hearing was clear and convincing that Parker knowingly used her position as PVA to obtain financial gain for Christis Garland. Joyce Parker should henceforth not hire family members as employees in the Laurel County PVA Office. She should post a copy of KRS 11A.020 prominently in a public place in her office as a reminder of the law. Because Parker did not know the requirement of the law (although she should have), and she put her resources toward determining the full requirements of the law in *Kentucky Executive Branch Ethics Commission v. Atkinson*, 339 S.W. 3d 472 (Ky. App. 2011), she should pay a reduced penalty of \$2,000.

RECOMMENDED ORDER

On the basis of the above Findings of Fact and Conclusions of Law, it is recommended that Joyce Parker be ordered to henceforth obey KRS 11A.020(1)(c); to post a copy of KRS 11A.020 prominently in a public place in her office as a reminder of the law; and to pay a civil penalty of \$2,000 to the Executive Branch Ethics Commission.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110 (4) you have the right to file exceptions to this recommended decision:

- (4) A copy of the hearing officer's recommended order shall also be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations with the agency head.

In order to preserve a right to review by the circuit court, case law requires that a litigant must file exceptions with the board or agency if there is anything in the recommended order with which a party does not agree and desires to appeal.

You have a right to appeal the Final Order of the agency pursuant to KRS 13B.140 which reads in part:

- (1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the

Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Pursuant to KRS 23A.010(4), "Such review [by the Circuit Court] shall not constitute an appeal but an original action." The Court of Appeals has suggested that an appeal to circuit court is commenced upon the filing of the appeal petition and the issuance of a summons within the 30-day time period for filing an appeal.

SO ORDERED this ^{7th} day of March, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER was mailed this 7th day of March, 2012, by messenger mail, to:

DEBBIE BRISCOE
EXECUTIVE ASSISTANT
EXECUTIVE BRANCH ETHICS COMM
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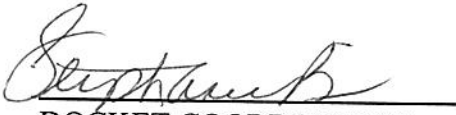
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